



The following constitutes the order of the Court.  
Signed: May 28, 2019

*M. Elaine Hammond*

M. Elaine Hammond  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re	)	Case No. 14-54232 MEH
Pacific Thomas Corporation,	)	Chapter 11
	)	
	)	
Debtor.	)	
	)	
	)	Adv. No. 14-05114
Kyle Everett, Chapter 11 Trustee,	)	
Plaintiff.	)	
v.	)	
Randall Whitney, et. al.,	)	<b><u>Trial Held</u></b>
	)	Date: March 14, 2019
Defendants.	)	Time: 10:00 a.m.
	)	Ctrm: Courtroom 3020, 280 South
	)	First Street, San Jose, CA.

**MEMORANDUM DECISION REGARDING TURNOVER AWARD**

On March 27, 2018, the Ninth Circuit issued a memorandum vacating this court's judgment and remanding for further findings (Dkt. #234). Following entry of the Order Vacating Judgment (Dkt. #235) this court conducted a bifurcated trial on whether the parties'

1 lease agreements are void under principles of California law and the appropriate judgment  
2 amount. As set forth in the Supplement to Decision After Trial Following Remand (Dkt.  
3 #264), this court found that the 2005 lease agreement between Pacific Trading Ventures  
4 (“PTV”) and Pacific Thomas Corporation (“Debtor”) was invalid. In its remand, the Ninth  
5 Circuit instructed the court to determine whether the parties’ various lease agreements (the  
6 2005 lease, the 2008 lease, the 2010 extension, and the 2012 amendment) were void under  
7 principles of California law. Following determination of this issue, the court was required to  
8 calculate the extent to which PTV’s right to reimbursement under the management agreement  
9 affects any turnover award.

10 An evidentiary hearing was held on March 14, 2019, to determine what amounts, if  
11 any, are owed by PTV to the Debtor’s estate. The Chapter 11 Trustee (“Trustee”) and PTV  
12 participated in the hearing.

13 It is Trustee’s burden to establish the estate is entitled to a turnover. *In re Jacobson*,  
14 676 F.3d 1193, 1200-01 (9th Cir. 2012). Trustee must establish by a preponderance of the  
15 evidence that: “(1) the property is (or was during the bankruptcy case) in the possession,  
16 custody or control of a noncustodial third party; (2) the property constitutes property of the  
17 estate; (3) the property is a the type that the trustee could use, sell or lease pursuant to section  
18 363 . . . , and (4) the property is not of inconsequential value or benefit to the estate.” 5 Collier  
19 on Bankruptcy ¶ 542.03 (16th 2019).<sup>1</sup>

20 Pursuant to the 2003 Management Agreement between PTV and Debtor  
21 (“Management Agreement”), as amended in January 2011 (“Amended Management

22 <sup>1</sup> In its Closing Brief, PTV argues that the applicable standard is “clear and convincing evidence”  
23 in reliance on the pre-Code case of *Maggio v. Zeita (In re Luma Camera Service, Inc.)*, 333 U.S.  
24 56 (1948). Since enactment of the Bankruptcy Code, Supreme Court cases have adopted the  
25 preponderance of the evidence standard in bankruptcy cases. *See Grogan v. Garner*, 498 U.S. 279  
26 (1991) (finding that preponderance of the evidence standard applies to exceptions to  
27 dischargeability of debts, including nondischargeability for fraud). In *Jacobson*, the Ninth Circuit  
28 applied a preponderance of the evidence standard without deciding whether a higher standard  
evidence standard as well.

1 Agreement”), PTV operated Debtor’s self-storage facility in Oakland and managed real  
2 property owned by Debtor at the same location (collectively, the “Premises”). PTV collected  
3 all rents and self-storage fees due from tenants and made or had control over all operations,  
4 maintenance, repairs, and capital improvements of the Premises.<sup>2</sup> In operation, PTV collected  
5 Debtor’s income and used it directly to pay Debtor’s expenses, or paid Debtor’s expenses  
6 with PTV funds and reimbursed itself from Debtor’s funds. The Management Agreement  
7 authorizes PTV to receive a fee of six percent (6%) of the gross revenues per months based on  
8 accrued charges or \$2,000 per month, whichever is greater. Additional compensation is  
9 allowed for non-recurring repairs, capital improvements or large projects.<sup>3</sup> Further, “the cost  
10 of certain personnel who supervise, or otherwise participate in, the direct management of the  
11 [self-storage and related business] will be paid by [Debtor].”<sup>4</sup>

12 Trustee asserts that PTV collected rents owed to Debtor and, in addition to using them  
13 for Debtor’s expenses, used these funds for purposes that did not benefit Debtor – instead  
14 benefiting PTV, Darrow Family Partners, Thomas Capital Investments, Randall Whitney and  
15 Jill Worsley. Trustee testified that if these funds had been available to Debtor, then Debtor  
16 could have used them for payment of property taxes and other obligations. Trustee seeks  
17 turnover of \$376,522 which is not of inconsequential benefit to the estate.

18 Trustee’s claim is based on entries contained in the Quickbooks created and  
19 maintained by PTV, and obtained from PTV’s bookkeeper in December 2013 (the “PTV  
20 Quickbooks”). Trustee relies on the check detail and notations contained in the PTV  
21 Quickbooks, along with supporting invoices where available. Notably, much of Trustee’s  
22 concern relates to the lack of backup, such as invoices or receipts, to support the expenditures.  
23 All claims relate to the period between Debtor’s petition date, August 6, 2012, and  
24 December 10, 2013, following termination of the Management Agreement for cause by

25 \_\_\_\_\_  
26 <sup>2</sup> Management Agreement, Article II.

27 <sup>3</sup> Amended Management Agreement, Article VI.

28 <sup>4</sup> Management Agreement, Article V.

1 Trustee and entry of a preliminary injunction.

2 In his review of the PTV Quickbooks and any notations or other information provided  
3 therein, Trustee determined that PTV received a total of \$697,786.35 during this time period.

4 In review on remand, the funds paid out by PTV were divided into categories based on the  
5 check, invoice, and/or Quickbooks notes detail. Trustee then identified each category as those  
6 that “appeared to be legitimate estate operating expenses” and those that “do not appear to be  
7 legitimate estate operating expenditures.” A summary by category was admitted into  
8 evidence, in addition to line item entries by category. In total, Trustee identified \$321,234.25  
9 in expenditures that appeared to be legitimate.<sup>5</sup>

10 The Trustee then testified as to those categories that did not appear to be legitimate  
11 expenses of Debtor. In sum, Trustee identified \$376,552.10, in disputed expenses divided into  
12 37 categories.

13 Randall Whitney, Debtor’s former president, and an officer of PTV presented  
14 opposing testimony. Through his testimony, Whitney asserted that a portion of the claims in  
15 28 of the categories were for the benefit of Debtor or Debtor’s estate. PTV’s president, Jill  
16 Worsley, also testified about her control over expenditures. Worsley did not address the  
17 disputed expenditures by category or line item but testified that she was the primary  
18 individual responsible for PTV’s management of PTC’s self-storage and real property  
19 interests. Specifically, she stated that she was the only authorized signer of PTV’s checks, that  
20 twice a month she and the PTV bookkeeper would review monthly expenses and the budget;  
21 and that Worsley maintained final approval over all payments. She was adamant that neither  
22 she nor the bookkeeper would authorize payment without sufficient back-up.

23 The PTV Quickbooks established that in accordance with the Management  
24 Agreement, PTV collected income generated by Debtor’s self-storage facility and real  
25 properties and used these receivables to pay the operating expenses of Debtor. However,

---

26 <sup>5</sup> Trial exhibit 24-0002 identified \$367,637.25 as appearing legitimate, in testimony Trustee  
27 reduced this by \$46,403 based on Outside Labor (Cash), discussed infra.

PTV also used Debtor's income to fund expenses of PTV and additional entities affiliated with Whitney or Worsley, such as Darrow Family Partner and Thomas Capital Investments.

Consistent with the parties' presentation of evidence, the amounts in dispute are reviewed by category as follows:

Rents Received but Not Deposited:

Trustee testified that PTV's Quickbooks reflected \$37,000 in cash received on behalf of Debtor that was never deposited into a bank account. Instead, the funds were applied towards cash payments. Of these funds, Trustee identified \$6,000 that he testified do not appear to be legitimate expenses of the Debtor, with the remainder allocated to "Outside Labor Cash" (discussed in the following section). PTV did not address these funds at trial. In its closing brief, PTV argues this assertion should be disregarded because the only evidence to support it is oral testimony. Witness testimony is a form of evidence, subject to determinations of credibility by the trier of fact. *United States v. 4.0 Acres of Land*, 175 F.3d 1133, 1142 (9th Cir. 1999); *Kalvar Corp. v. Xidex Corp.*, 384 F. Supp. 1126, 1132 (N.D. Cal. 1973), *aff'd*, 556 F.2d 966 (9th Cir. 1977). Both Trustee and PTV rely extensively on oral testimony, including opinion testimony. Here, as in other areas below, the court will consider such evidence in determining whether Trustee establishes PTV owes funds to Debtor's estate or PTV adequately rebuts the claim asserted by Trustee.

For the purposes of this section, I find that the Trustee presented evidence based upon the PTV Quickbooks that significant sums of money were paid by PTV in cash to third parties. PTV does not dispute that at least \$46,000 was paid in cash to outside labor during the 16 month period at issue. As such, I find Trustee's testimony credible that PTV received and paid cash in its standard operations without running these funds through its bank accounts. Thus, of the additional rents received but not deposited, \$6,000 was not paid for

1 legitimate operational expenses of Debtors. The remainder of \$31,000 is addressed in the  
2 following section.

3  
4 Outside Labor (Cash):

5 Trustee asserts that a total of \$77,403 in cash payments to outside labor without any  
6 supporting invoices or 1099s is excessive for a self-storage business of this size. Considering  
7 Debtor's maintenance, repair, and landscaping needs the Trustee admits that some portion of  
8 these expenses may be legitimate business expenses of Debtor. Neither Whitney nor Worsley  
9 addressed the cash payments to outside labor in their testimony. The Management Agreement  
10 authorizes PTV to hire, through Debtor, "maintenance personnel and other individuals  
11 rendering services or performing activities on the Premises in connection with its operation or  
12 maintenance."<sup>6</sup> Of the various entities involving Whitney or Worsley (e.g. PTV, Debtor,  
13 Darrow Family Partners, Thomas Capital Investments), Debtor's operations required the  
14 greatest amount of maintenance, repair, and other labor. As such, the court finds that 80% of  
15 the outside labor, \$61,922.40, will be recognized as a legitimate expense of Debtor paid by  
16 PTV.

17  
18 Accountant & Taxes:

19 Trustee asserts that \$7,432 paid to Timothy Brophy is not an expense of Debtor. Mr.  
20 Brophy is a CPA that prepared the taxes of PTV for approximately 10 years, and of Debtor  
21 for 6 to 7 years. He was a witness at the original trial in this adversary proceeding on  
22 April 29, 2014.

23 For Mr. Brophy to perform and be compensated for services during Debtor's  
24 bankruptcy, the court must approve his retention following review of an employment  
25

26 \_\_\_\_\_  
27 <sup>6</sup> Management Agreement, Article V.  
28

1 application and subsequent approval of his compensation. *See* 11 U.S.C. §§ 327, 330.<sup>7</sup>  
2 Brophy was never employed in this case. In addition, Trustee testified that based upon the  
3 payment information the payments to Brophy were on account of a pre-petition balance. If  
4 Debtor had sought to retain Brophy, to satisfy the “disinterested” requirement for employment  
5 Brophy would have had to waive any prepetition amount due to him. Payment to Brophy  
6 during the case without court approval is neither authorized by the Code nor a benefit to  
7 Debtor. This expense is not a legitimate expense of Debtor paid by PTV.

8  
9 Accounting:

10 PTV paid \$35,093.90 to L&S Enterprises, for the services of Linda Manning as its  
11 bookkeeper. Trustee asserts that this is not a legitimate expense of Debtor because all of  
12 Manning’s time was coded to Walnut Creek (the PTV location) and the payments to L&S  
13 Enterprises are never split between PTV and Debtor.

14 Manning was a witness at the initial trial. At trial she identified herself as the  
15 bookkeeper for PTV. She did not identify herself as the bookkeeper for Debtor. The  
16 Management Agreement does not provide for Debtor to pay PTV’s operational expenses and  
17 Manning is neither property-level personnel for the Premises nor an individual that  
18 participated in direct management of the Debtor. As such, payment to L&S Enterprises is the  
19 obligation of PTV.

20  
21 Appraisal Fees:

22 PTV paid \$9,400 for appraisal fees incurred by Whitney in connection with attempts  
23 to refinance the loans held by secured creditors of Debtor. Like accountants, Bankruptcy  
24 Code § 327(a) identifies appraisers as professional persons whose employment and

25  
26 <sup>7</sup> Unless specified otherwise, all chapter, code and rule references are to the Bankruptcy Code, 11  
27 U.S.C. §§101–1532, and the Federal Rules of Bankruptcy Procedure, Rules 1001–9037 (referred  
28 to herein as the “Bankruptcy Code”).

1 compensation are required to be approved by the court. Debtor never sought to employ these  
2 appraisers, and so, the fees were not a legitimate expense of Debtor

3  
4 Cleaning Service:

5 PTV paid \$2,460 to Magic Touch Cleaning Service. Trustee asserts this expense was  
6 for the benefit of PTV and not the Debtor. Whitney testified that Magic Touch was the  
7 cleaning service for the Walnut Creek office, which is PTV's business location. This  
8 expenditure was not a legitimate expense of Debtor.

9  
10 Dental Insurance:

11 Trustee asserts that \$2,432.01 paid for Whitney's dental insurance was not an expense  
12 of Debtor as Whitney was not an employee of the Debtor. As discussed further below,  
13 Whitney testified that he provided direct, on-site supervision during this period, and took  
14 draws of \$1,000 per month as compensation. This is consistent with the Management  
15 Agreement. Provision of dental insurance as an employment benefit is a form of  
16 compensation. As such, \$2,432.01 is a legitimate expense of Debtor.

17  
18 Dues & Subscriptions:

19 Trustee objects to expenditures of \$391.50 categorized as dues and subscriptions.  
20 Whitney testified that a portion of these expenses, \$286.50 paid to Count Me In, LLC, was for  
21 tracking employees in and out of the self-storage facility. Debtor received the benefit for  
22 these services and \$286.50 is a legitimate expense of Debtor.

23  
24 Entertainment:

25 Trustee objects to \$282.55 paid to the Pacific Racing Association for a holiday party.  
26 Notations in the PTV Quickbooks identify it as the "WC Xmas Party." "WC" appears to  
27  
28



1 reference Walnut Creek, the business location of PTV. Whitney testified that he had no  
2 information on this expense. Thus, all evidence indicates there was no benefit to Debtor from  
3 this payment.

4  
5 Gas:

6 Trustee recognized \$652.31 in gas expenses associated with Budget Truck Rental as a  
7 legitimate expense of Debtor. Trustee asserts that \$2,667.20 paid directly to four gas  
8 companies is not an expense of Debtor as there is no indication that it relates to the Budget  
9 Truck Rental operation. Whitney testified that these payments were a combination of gas for  
10 the truck rental and employee reimbursements for driving between PTV's offices in Walnut  
11 Creek and Debtor's facility in Oakland. This testimony is not convincing as Whitney and  
12 Worsley appear to be the only individuals that regularly drove between the two locations, and  
13 as they had multiple interests, there is no indication that their gas is entirely the responsibility  
14 of Debtor. Further, as the PTV Quickbooks had a separate account for Budget Truck Rental,  
15 the failure to allocate these expenses to that account are evidence that they are not for that  
16 purpose. These payments are not legitimate expenses of Debtor.

17  
18 Jill Worsley:

19 Trustee objects to \$65,174.74 paid to Worsley. The PTV Quickbooks notations  
20 indicate that of this amount \$51,000 was for monthly draws of approximately \$3,000 per  
21 month to Worsley. Article V of the Management Agreement provides for payment by Debtor  
22 of individuals who supervise or otherwise participate in direct management of the Premises.  
23 Worsley testified that she supervised management of the Premises. Also, in this category,  
24 Whitney identified reimbursements of \$1,861.35 for outside labor as for the benefit of Debtor.  
25 Accordingly, \$52,861.35 is a legitimate expense of Debtor.

1 Legal:

2 Trustee objects to \$30,152 categorized as legal. The expenditures are to multiple  
3 entities. A line-item review indicates that the following are legitimate expenses of Debtor:  
4 \$1,039 to Debtor's initial bankruptcy counsel for the chapter 11 filing fee, \$201 to CourtCall  
5 for monitoring of bankruptcy court hearings, and \$220 to Key Service Corporation, the entity  
6 identified by Whitney as providing employee background checks. The remainder of payees  
7 primarily consist of payments to attorneys for PTV (e.g. David Sternberg, Paul McCarthy);  
8 legal entities not retained or authorized to receive compensation pursuant to Bankruptcy Code  
9 §§ 327 and 330 (e.g., Bicycle Engineering, Capital Restructure Group); or county recorder or  
10 superior court filings not for Debtor's benefit. As such, \$1,262 is a legitimate expense of  
11 Debtor.

12  
13 Marketing/Promotion:

14 Trustee asserted that there is no evidence to support that \$18,733.48 in expenditures  
15 for marketing and promotion are for the Debtor. PTV asserts that the majority of these  
16 expenses related to attracting customers to the Premises and seeks to have \$17,499.18  
17 recognized as expenses of Debtor. Whitney credibly identified in his testimony Constant  
18 Contact as a service for communications to existing and future customers, Loopnet as an  
19 online market for commercial space, Performance Self-Storage as a group that focused on  
20 attracting new self-storage customers through phone marketing, SpareFoot as a marketing  
21 website that aggregates groups of people to self-storage in their neighborhood, and Web.com  
22 as a website hosting group. Whitney also testified that Leslie Whitney, his wife, was  
23 reimbursed or paid a flat fee for marketing services. This testimony is consistent with the  
24 PTV Quickbooks notation of SafeStorage associated with the checks to her.

25 Whitney's testimony on other points was not credible. Specifically, that the Asian  
26 American Bar Association was an Oakland related industry group bringing people to Debtor's  
27  
28

1 location and that the Bay Area Writing Project was a marketing consultant that helped  
2 organize Debtor's marketing efforts. Further, there are several smaller checks where no  
3 attempt was made to assert that they were an expense of Debtor. In the end, \$12,826.90 is a  
4 legitimate expense of Debtor.

5  
6 Office Supplies:

7 Trustee recognized \$16,787.31 in office supplies coded in the PTV Quickbooks to  
8 either Oakland or Safe Storage. He asserts that \$4,292.34 coded to Walnut Creek are  
9 obligations of PTV, not the Debtor. Whitney testified that East Bay Blue Print and Supply  
10 held all the architectural and construction plans. During this period, Trustee was pursuing a  
11 sale of Debtor's real property and Debtor provided plans and information helpful to these  
12 efforts. Payments of \$185.64 to East Bay Blue Print are allocated to Debtor. Whitney also  
13 testified that FedEx Office was used for most materials and paperwork. However, this  
14 testimony is inconsistent with the equivalent expenditures to Office Depot and Quill  
15 Corporation for office supplies allocated in the PTV Quickbooks to Debtor. Payments  
16 totaling \$185.64 are legitimate expense of Debtor.

17  
18 Other Expenses:

19 Trustee asserts that a payment of \$100 to Frank Spangler is an expense of PTV rather  
20 than Debtor based on its categorization as a Walnut Creek expense in the PTV Quickbooks.  
21 Neither Whitney nor Worsley addressed this in their testimony. The evidence is that this was  
22 a payment on behalf of PTV rather than Debtor.

23  
24 Parking:

25 Trustee asserted that \$490.34 in expenditures for parking primarily related to court  
26 hearings and were not for the benefit of Debtor. Whitney testified that this parking provided a  
27  
28

1 mixed benefit to PTV and Debtor as the parking lots identified are centrally located and used  
2 for visits to the court, the planning office, and other nearby businesses. As such, these  
3 parking expenses appear to have benefited both PTV and Debtor. A legitimate expense of  
4 \$245.17 for Debtor is recognized.

5  
6 Postage & Delivery:

7 Trustee recognized \$6,596.04 in payments to Neopost as legitimate postage and  
8 delivery expenses of Debtor. These payments were each coded to Debtor in the PTV  
9 Quickbooks. Trustee asserts that the \$1,150.93 paid to the USPS is an expense of Debtor.  
10 Whitney guesstimated that these expenses should be split between Debtor and PTV.  
11 However, a review of the PTV Quickbooks detail indicates that at least one of the payments  
12 relates to Thomas Capital Investments. Thus, these payments were made for multiple entities.  
13 Removing the payment for the benefit of Thomas Capital Investments, and dividing the  
14 remaining expenses between the four entities, \$266.82 is a legitimate expense of Debtor.

15  
16 Property Tax:

17 Trustee asserted that three payments totaling \$886.39 to the tax collectors for Alameda  
18 and Contra Costa County were not Debtor's expenses because Debtor's property taxes were  
19 significantly larger. Debtor is located in Alameda County and PTV is located in Contra Costa  
20 County. There is no indication in the record that PTV had assets or a basis to pay taxes in  
21 Alameda County, as such Trustee's position that the Alameda County taxes must be PTV's is  
22 not compelling. An expense of \$870.08 is recognized as a legitimate expense of Debtor.

23  
24 Randall Whitney:

25 Trustee asserts that \$91,694 paid to Whitney during this period was not for the benefit  
26 of, or a legitimate expenditure of, Debtor. Whitney testified that after Debtor's bankruptcy  
27  
28

1 filing, instead of serving in his prior role as president of the Debtor, he was the appointed  
2 responsible party.<sup>8</sup> He also stated that he worked 6 to 7 days per week at the Oakland  
3 property and took draws of \$1,000 as his compensation. Review of the challenged  
4 expenditures indicates that Whitney received \$1,000 per month between August 2012 and  
5 August 2013 for a total of \$13,000 in compensation.<sup>9</sup> Again, Article V of the Management  
6 Agreement provides for Debtor to pay personnel who participate in direct management of the  
7 Premises. These draws are thus legitimate. In addition, the memo line on some  
8 reimbursements clearly identify a business purpose to the expense reimbursement. These  
9 expenditures reimbursed to Whitney total \$2,745.

10 Whitney also identified two payments he received as reimbursement for payments to  
11 secured creditors: (a) \$17,000 to Whitney, memo notation "Wire for FCI Pmt" and (b)  
12 \$8,166.67 to Whitney, memo notation "Wire for Bowers Pmt."<sup>10</sup> These payments were made  
13 to Whitney within a month of the petition date, while Debtor remained a debtor-in-possession  
14 ("DIP"). It is unclear whether the payments to the secured creditor were made before or after  
15 the petition date. If the payments were made to the secured creditor prepetition, then any  
16 claim for reimbursement Whitney may have is an unsecured prepetition claim not entitled to a  
17 100% reimbursement post-petition. If the payments were made to the secured creditor  
18 postpetition, then reimbursement of Whitney is counter to the terms of the stipulation for use

19 <sup>8</sup> Northern District of California Bankruptcy Local Rule 4002-1 provides that a debtor-in-  
20 possession that is not an individual shall file an application and obtain an order appointing a  
21 natural person to be responsible for the duties and obligations of the debtor-in-possession, as set  
forth in FRBP 4002.

22 <sup>9</sup> How these funds were paid varied. Most months a \$1,000 payment was provided but a few  
times the payment was split into two payments, and the May through August 2013 payments  
23 appear to have been made via single payment in August 2013.

24 <sup>10</sup> These appear to be for payments to the same entity, Private Capital Investments, f/k/a Bowers  
Group ("PCI").

25 <sup>11</sup> Post-petition Debtor entered into a stipulation for use of cash collateral with PCI requiring  
monthly payments of \$8,166.67 from cash collateral. (Case No. 14-54232, Dkt. # 51). The  
26 subsequent order approving use of cash collateral stated: "Debtor is authorized to use cash  
collateral . . . provided that cash collateral is to be paid to the extent there are rent receipts to make  
27 the payment." (Dkt. # 123)

1 of cash collateral entered into between Debtor and PCI, and the requirements of the order  
2 approving the stipulation which only authorized payment to this junior secured creditor from  
3 rent receipts.<sup>11</sup> Nor did Debtor obtain approval for DIP financing from Whitney. *See* § 364.  
4 As such, these payments to Whitney are not legitimate expenditures of Debtor.

5       The remainder of this category primarily consists of reimbursements to Whitney.  
6 From the court's review of the PTV Quickbooks, it is clear that Whitney regularly used the  
7 Debtor's funds as if they were his personal assets. On numerous occasions Whitney withdrew  
8 Debtor funds from an ATM. The impression is that every time Whitney spent money he  
9 submitted it for reimbursement, for example McDonalds (lines #845, 862, 943), Jack in the  
10 Box (#839), a yogurt shop (#795), and Google Play (#997-999). Numerous travel expenses,  
11 especially to or in Hawaii (#628) were reimbursed, despite the fact Debtor has no property or  
12 operations in Hawaii.<sup>12</sup> Whitney also sought reimbursement several times for short-term  
13 workspace outside Debtor's business location (#725, 731, 732).

14       In sum, a total of \$15,745 is determined to be a legitimate expense of Debtor.  
15

16 Recruiting Expenses:

17       Trustee testified that a recruiting expense classified to "Walnut Creek" was an expense  
18 of PTV. No evidence to the contrary was provided. This is not a legitimate expense of  
19 Debtor.  
20  
21  
22  
23

---

24 <sup>11</sup> Post-petition Debtor entered into a stipulation for use of cash collateral with PCI requiring  
25 monthly payments of \$8,166.67 from cash collateral. (Case No. 14-54232, Dkt. # 51). The  
26 subsequent order approving use of cash collateral stated: "Debtor is authorized to use cash  
27 collateral . . . provided that cash collateral is to be paid to the extent there are rent receipts to make  
28 the payment." (Dkt. # 123)

<sup>12</sup> Non-debtor entities affiliated with Whitney or Worsley have real property in Hawaii.

1 Refinance:

2 Trustee was appointed in January 2013. In February and March 2013, PTV sent three  
3 wires totaling \$11,500 to an entity Thorofare Capital, as a part of efforts by Whitney to obtain  
4 a refinance of Debtor's secured obligations. These payments were made to professionals  
5 without court approval and were not authorized by Trustee, who was then responsible for  
6 Debtor's estate. Further, the terms of the Management Agreement are limited to management  
7 of the Premises, including the self-storage operations. This type of financial restructuring is  
8 outside the scope of PTV's property management obligations. These payments are not a  
9 legitimate expense of Debtor.

10  
11 Rent:

12 Trustee asserts that rent paid for PTV's headquarters at 1818 Mt. Diablo Boulevard in  
13 Walnut Creek is PTV's obligation. Whitney testified that Debtor's development office was  
14 located downstairs and the rent should be shared. Whitney's testimony is not compelling for  
15 two reasons. First, if Debtor used or had a contractual obligation for this location, this  
16 information would be known to Trustee. Second, PTV was the property manager for the self-  
17 storage facility at Debtor's Oakland property. The Management Agreement addresses PTV's  
18 obligations regarding these property-specific operations and do not include any development  
19 operations of Debtor. Rent for PTV's office is the responsibility of PTV.

20  
21 Rental (Vehicle Rental):

22 Trustee recognized \$15,539.33 as a legitimate business expense of Debtor in  
23 connection with the Budget Truck rental available at Debtor's Premises. He asserts that  
24 \$7,079.29 in expenses paid to Avis Car Rental are not legitimate. Whitney asserts that these  
25 expenses relate to car rentals associated with the truck rental location. Whitney's testimony is  
26 not consistent with how each of these expenses are treated in the PTV Quickbooks. Payments  
27  
28

1 to Budget Truck Rental include a memo notation with the dealer number and are coded to  
2 “Budget Truck Rental Revenue.” In comparison, payments to Avis Car Rental do not include  
3 any dealer information and are coded to “Rental.” As such, these are direct payments for car  
4 rentals not associated with Debtor’s operations.

5  
6 Repair & Maintenance:

7 Trustee recognized \$11,531.56 as legitimate repair and maintenance costs for Debtor’s  
8 self-storage business and challenges three invoices totaling \$3,443.90 that were coded as  
9 related to Walnut Creek instead of Debtor’s Oakland operations. Notably, one invoice for  
10 \$1,950 was for July 2012, and is a prepetition debt. Whitney stated that these invoices  
11 “looked like” they were for services rendered to Debtor. But as Whitney was not responsible  
12 for reviewing invoices or overseeing repairs, his testimony is not compelling. These  
13 payments are not the responsibility of Debtor.

14  
15 Security:

16 Trustee asserts that \$1,050 for Pacific Rim Security was coded to Walnut Creek and  
17 there is no information to support it being an expense of Debtor. Whitney testified Pacific  
18 Rim provided the security service at the Oakland property. As Trustee has not identified  
19 legitimate security expenses for a different provider in Oakland, this is a legitimate expense of  
20 \$1,050 of Debtor.

21  
22 Telephone & Internet:

23 Trustee recognized \$5,344.60 as a legitimate expense of Debtor for telephone and  
24 internet. He challenges \$15,722.60 on the basis that it was coded as an expense for Walnut  
25 Creek and there is no additional information. In review of the information provided in the  
26 PTV Quickbooks, the additional details for most line items reference Walnut Creek, but



1 several categories do not. In particular, payments to AT&T Mobility and Verizon Wireless  
2 are not associated with Walnut Creek. Whitney testified that a portion of these charges were  
3 for data and cell phone service provided to on-site employees. Based upon this information a  
4 total of \$5,223.57 is allowed as a legitimate expense of Debtor.

5  
6 Travel:

7 Trustee asserts that \$415.90 paid in July 2013 to Delta and Southwest Airlines were  
8 not legitimate expenses of Debtor. Trustee noted that there was no travel involved in  
9 Debtor's bankruptcy case, thus, these expenses were not required. Whitney testified that the  
10 charges were for travel to a self-storage industry conference although the individual who  
11 participated in the conference was not identified. While participation in such a conference  
12 may have benefited PTV's professionals, participation in such a conference falls outside of its  
13 responsibilities under the Management Agreement. As such, this is not a legitimate expense  
14 of Debtor.

15  
16 Pre-Petition Balances Paid Post-Petition:

17 PTV paid \$4,748.70 on pre-petition unsecured claims against Debtor. Debtor never  
18 sought authorization for payment of these claims in full prior to confirmation of a plan.  
19 Unsecured creditors are not anticipated to receive a 100% distribution on their claims. This is  
20 an expense that Debtor was neither required nor authorized to pay in the ordinary course, thus  
21 there was no benefit to Debtor of this payment by PTV.

22  
23 Summary of Adjustments

24 Applying these adjustments, Trustee established a claim for \$224,608 against PTV for  
25 payments made by PTV from Debtor's funds that were either not legitimate operating  
26 expenses of Debtor or not authorized by the Bankruptcy Code or court, and thus did not  
27  
28

benefit Debtor. Following entry of judgment, PTV is authorized to offset its allowed management fee of \$109,225 against the Judgment, in accordance with Bankruptcy Code § 553.

Supplemental Requests

At the end of trial, the court authorized closing briefs. If PTV chose to assert a claim for affirmative relief in its closing brief, then Trustee was permitted to respond. PTV asserted a judgment should be entered in its favor, and Trustee then filed a supplemental closing brief.

In addition to these permitted briefs, PTV filed a supplemental trial brief (Dkt# 313), stating that Trustee turned over an inventory listing with photos of all the evidence obtained from PTV and currently in Trustee's possession. PTV requested the turnover of all the items listed in the inventory to PTV and that the court strike Trustee's argument that PTV should be estopped from presenting evidence because PTV did not turn over its books and records. This supplemental brief was not authorized. Further, a supplemental brief is not the proper method to obtain affirmative recovery on an issue not raised at trial; and as is evidenced through this decision, the court considered the evidence presented by PTV. As such, this request will not be considered.

Following a substitution of counsel for PTV, Jill Worsley (PTV's president) filed a second unauthorized brief (Dkt# 316). Pursuant to Northern District of California Bankruptcy Local Rule 9010-1, and consistent with California law, an attorney must represent a corporate entity. As Worsley is not an attorney, she is not permitted to file such a brief on behalf of PTV. Therefore, any arguments raised in her brief were not considered.

Conclusion

A judgment consistent with the decision entered at Docket #264 and this decision is entered contemporaneously herewith.

**\*\*END OF ORDER\*\***

**COURT SERVICE LIST**

**Randall Whitney**

P.O. Box 4186

Walnut Creek, CA 94596

**Mia Blackler**

Lubin Olson & Niewiadomski

LLP 600 Montgomery Street, 14th

San Francisco, CA 94111

**C. Alex Naegele**

19925 Stevens Creek Boulevard, Suite 100

Cupertino, CA 95014

ECF Participants